Supreme Court of Pennsylvania.

CUSTAR v. THE TITUSVILLE GAS AND WATER CO.

Where the representations made by an agent to obtain subscriptions are a part of a scheme of fraud, participated in by the officers authorized to transact the business of a corporation, or where they are such as the subscriber may reasonably presume the corporation to have authorized, they are admissible to prove the fraud by means of which the subscription was procured.

Where such representations are contrary to the interests and duty of the corporation, as, that he will release, or has authority to release, the subscription, it is not a reasonable presumption that he has such authority, and a subscriber on such terms would be *particeps criminis*, and held to all the responsibilities of a *bona fide* subscriber.

But where, for the purpose of proving fraud, the offer was to show, by a previous subscriber for six shares, that he was induced by the president to change his subscription to twenty-six shares on receiving from the president a release, in writing, from the payment of twenty shares, it was construed to be an offer to show a release from the company, and the court below erred in rejecting it.

Five per cent. per month on the subscription, payable after failure for thirty days to pay the call, though denominated interest, is not merely interest in the ordinary sense of the term, but is obviously a penalty to enforce payment, and it is agreeable to the act that payment be enforced, either by forfeiture of the stock itself, or by a penalty of five per cent. per month for delay.

Error to the Court of Common Pleas of Crawford county.

The opinion of the court was delivered by

AGNEW, J.—In *Crossman* v. *Penrose Ferry Bridge Company*, 2 Casey, 69, it was said by Justice KNOX, that a subscription to capital stock, induced by the fraudulent representations or statements of an agent appointed to obtain subscriptions, may be avoided by the subscriber. And in *Coil* v. *Pittsburgh Female College*, 4 Wright, 439, it was held, that representations by agents of the college, that enough had been and would be subscribed, before the subscriptions for scholarship would be collected, to pay off the entire indebtedness of the college, and make the scholarships worth the notes given for them, are to be treated as expressions of opinion only, no fraud being alleged; from which it might be inferred that fraud being alleged, the falsehood of the representations would invalidate the subscription. On the other hand, it was held, in *Bank of United States* v. *Dunn*, 6 Peters, 51, *Bank of Metropolis*, v. *Jones*, 8 Peters, 12, and *Stewart* v. *Huntingdon Bank*, 11 S. & R., 267,

that the declarations and assurances of the officers of a bank, that an endorser or other party would incur no responsibility by his endorsement or signature, are unauthorized, and not binding on the bank, without authority from the directors. In *Hackney* v. *Allegheny County Mutual Insurance Company*, 4 Barr, 185, it was decided that the false and unauthorized representations of an agent to receive applications for insurance and the premium on a mutual insurance company, whereby the assured became a member of the company, are not admissible as a defence, in an action on a premium note; nor are the similar representations of the president to the agent, at the time of his appointment. The representations there were that the company was not taking risks at Pittsburgh, or other large cities. As it turned out, the company was broken up by its numerous risks taken in Pittsburgh, before the great fire of 1845.

The law as to the duty of an agent of a corporation, is thus stated in Angel & Ames on Corporations, page 249: "The representations, declarations and admissions of the agent of a corporation, stand on the same footing with those of an individual. To bind the principal, they must be within the scope of the authority confided to the agent, and must accompany the act or contract which he is authorized to make." The principle of the cases would seem to be this: That where representations made by an agent to obtain subscriptions, are a part of a scheme of fraud participated in by the officers authorized to manage its affairs, or where they are such as the agent may reasonably be presumed by the subscriber to have the authority of the corporation to make them, his representations may be given in evidence, to show the fraud by means of which the subscription was procured. But where there is no reasonable presumption of authority, and no actual authority to make them, the corporation should not be prejudiced by the unauthorized acts of the agent. Hence, where the representations of the agent are contrary to the interests and duty of the corporation, as that he will release, or has authority to release, the subscription he is taking, it is not a reasonable presumption that he has such authority, and a subscriber on such terms would be *particeps criminis*, and held to all the responsibilities

of a *bona fide* subscriber. This is the very point decided in *Robinson* v. *The R. R. Co.*, 8 Casey, 334. On the other hand, a subscription to be paid in blacksmith work, acquiesced in by the commissioner taking the subscription; was held to be recoverable only on this condition: *McConahy* v. *Turnpike Company*, 1 Penna., 426. Tested by these principles, the first assignment of error cannot be supported. The offer was not to show a scheme of fraud on part of the company to procure worthless subscriptions of stock, in order to inveigle others; but it was merely to prove the *agreement* of the president that the subscriber should not be called on for payment of his subscription, as itself the evidence of fraud upon *bona fide* subscribers. Offered in connection with the participation of the directors, the act of the president might be a link in the chain of fraud to be proved; and offered as itself the evidence of fraud, it was not competent, without showing, or offering to show, that the company, through its managing officers, were privy to the fraud. The president, of himself, had no authority to release subscriptions, and it would be unreasonable to suppose he had, as it was contrary to the interest and duty of the company.

But the second offer comes up more nearly to the line, and depends on the meaning to be attributed to the language of the offer. The offer was to show, by a previous subscriber for six shares, that he was induced by the president to change his subscription to twenty-six shares, on receiving from the president a release, in writing, from the payment of twenty shares, for the purpose of showing fraud by means of ficticious subscriptions. Whose release was meant? The president's or the company's? If the former, it was unauthorized without proof of authority, and this offer went no farther than the first. If the company's release, then it was a fraud on *bona fide* subscribers. It seems to us we must understand that it was the company's release that was meant. Nothing less would exempt the subscriber from payment of the twenty shares, and make the stock "fictitious," in the language of the offer. We must take it, therefore, that the lease of the company was the kind meant by the offer, and, in that view, the court below erred in rejecting the offer to prove the fraud of the company.

A subscription to stock is a contract between the subscriber and the company, governed by the same rules of honesty and fairness in its enforcement that apply to ordinary contracts: *Railroad Company*, v. *Byers*, 8 Casey, 22; *P. and C. Railroad Company* v. *Graham*, 12 Casey, 77.

We think there was error, also, in taking from the jury the decision of the fact whether the meeting of October 18th, was in 1865 or 1866. The entry bore date in 1866, and, if this was a mistake, it was for the jury to find it.

We are of opinion, also, that the interest of five per cent. a month on the subscription, payable after a failure for thirty days to pay the call, is a *penalty*, and not merely interest in the ordinary sense of the term. It is called interest in the act, but its obvious purpose, and the amount (being at the rate of sixty per cent. per annum) is for the enforcement of payment by way of a penalty. The act says as much as that the company may enforce payment, either by forfeiture of the stock itself, or by a penalty of five per cent. a month for delay.

Judgment reversed, and a *venire de novo* awarded.

Supreme Court of Mississippi.

NAPOLEON B. STREET *v.* THE STATE OF MISSISSIPPI.

It is well settled that before the acts and declarations of one party can be received in evidence against another, in a criminal prosecution, there must be proof of a conspiracy *aliunde*.

But a conspiracy may be proved like other controverted facts, by the acts of parties or by circumstances, as well as their agreement.

Bail is never allowed in capital cases, where the proof is evident and the presumption great: *In re Bennoit*, 1 La., 142, cited and approved.

An indictment for murder furnishes no presumption against the accused at his trial, but as regards all intermediate proceedings between indictment and trial, it furnishes the strongest possible presumption of guilt.

When the return shows that the accused was arrested on a bench warrant upon an indictment for murder, the "detention" is legal; in such cases, instead of stating in the petition for *habeas corpus* that the imprisonment is illegal, it should claim that the prisoner is entitled to bail.

The jurisdiction of Supreme Court to grant bail in cases brought up on writ of error, is purely revisory and correctional. The judgment of the judge below must be regarded as presumptively right till error is shown.